IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DEPARTMENT OF CORRECTIONS, STATE OF DELAWARE,	)	
Respondent Below-Appellant,	)	
v.	)	C. A. No. 19115
DELAWARE CORRECTIONAL OFFICERS ASSOCIATION,	)	
Charging Party Below, Appellee.	)	

MASTER'S REPORT
(Application for Attorney Fees)

Date Submitted: April 7, 2003
Draft Report: August 1, 2003
Final Report: August 28, 2003

Lawrence W. Lewis, Esquire, Sherry V. Hoffman, Esquire, Department of Justice, Wilmington, Delaware; Attorneys for Appellant State

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GLASSCOCK, Master

This matter involves a dispute between the Department of Corrections of the State of Delaware (the "State") and the Delaware Correctional Officers' Association (the "Union"). Initially before me was an appeal from the Public Employment Relations Board (the "PERB") which had found that the State had engaged in an unfair labor practice in that it had (1) abrogated an agreement between it and the Union requiring the State to release to the Union names and addresses of prison guards; and (2) by breaching what the PERB considered to be an independent duty to provide those names and addresses to the Union.

The appeal was made moot by the de-certification of the Union by a vote of its members.[1] The Union now seeks reimbursement of its attorney's fees in this matter. This is my report on that fee application.

Facts

Although the facts in this matter have been stated fully elsewhere, it is helpful to review the course of this litigation. In February 1996 the State and the Union entered a "Memorandum of Understanding" (the "Agreement") which obligated the State to "provide the [Union] with a tri-monthly list of all employees

[1]Currently, prison guard employees of the State are represented by another union, the Correctional Officers' Association of Delaware.

in the [Union's] Department of Correction bargaining unit which contains the name, home address, position, classification and employment date of each bargain unit member . . . ." The Union had reciprocal obligations under the Agreement. The State abided by the agreement until February 2000. At that point, the State unilaterally determined that it would no longer honor the agreement to provide employees' names and addresses. The State contended that privacy interests of its prison guard employees prevented it from complying with the Agreement.

On July 25, 2000, the Union filed an unfair labor practice charge against the State with the PERB. The PERB referred two issues arising from the charge to a hearing officer: whether the decision to abrogate the Agreement amounted to an unfair labor practice; and whether, independent of the Agreement, the State had committed an unfair labor practice in failing to disclose the names and addresses of its employees.

On May 18, 2001 the hearing officer found that the names and home addresses of the employees were "reasonably necessary and relevant to [the Union] in the proper performance of its representation duties under the [Public Employment Relations Act, 19 Del. C. §1307(1)]." The hearing officer found that the State was thus obligated to provide the information as part of its duty to bargain in good faith, absent a legal prohibition to the contrary. Finding none, the

hearing officer concluded that "by refusing to provide [the Union] with the home addresses of bargaining Union employees . . . the State failed to bargain in good faith and violated 19 Del. C. §1307(a)(1), (a)(5)." Delaware Correctional Officers' Association v. Delaware Department of Correction, ULP No. 00-07-286, Murray-Sheppard, Hearing Officer (May 18, 2001) (Hearing Officer's Order) at 9-12.

The State appealed the hearing officer's order to the full PERB. The PERB issued its decision in September 2001. It found that the State's unilateral action to abrogate the agreement violated its duty to bargain in good faith, that there was no evidence establishing a change in a law between the execution of the Agreement and the State's decision to abrogate it, and that there was no basis on which to overturn the hearing officer's decision. The PERB affirmed the hearing officer's decision "in its entirety." Delaware Correctional Officers Association v. Delaware Department of Correction, ULP No. 00-07-286 (Sept. 10, 2001) (Board Review of Hearing Officer Decision) at 4-5. The State appealed that decision, leading to this action.

Before the Board, the State had argued that federal case law, significantly Sheet Metal Workers International Association v. United States Department of Veterans Affairs, 3rd Cir., 135 F.3d 191 (1998), interpreted federal statutes so as

to operate as a prohibition against the dissemination of the information sought by the Union. The PERB rejected the State's contention that a change in the law had made the Agreement between the parties unenforceable and directed the State to provide names and addresses of employees to the Union. On appeal, the State initially raised the same argument, and sought a stay of the order of the PERB. Based upon that understanding of the issues on appeal, I recommended that a stay issue. The parties agreed to go forward on the merits without judicial review of that stay. The parties then proceeded to brief the issues before me.

On review of the State's brief, it became clear that the State was no longer pursuing the argument it had made below: that federal cases in this area had led to a change in the law. Instead, the State now relied on a common law doctrine of privacy which it contended had always existed to prevent the release of the information which had, in fact, been released, pursuant to the Agreement, between 1996 and 2000. Because that issue had not been considered by the hearing officer or the PERB, I remanded the issue for the PERB to consider the Delaware common law issues raised for the first time on appeal. Department of Corrections v. Delaware Correctional Officers' Association, Del. Ch., No. 19115, Glasscock, M. (Apr. 1, 2002) (Order). I also recommended that the stay be lifted. The matter was remanded to the PERB where the outcome was, once more, contrary to the

State.[2] By the time the matter returned to me on appeal, however, the Union had been de-certified and the matter was moot. Department of Corrections v. Delaware Correctional Officers' Association, Del. Ch., No. 19115, Glasscock, M. (Dec. 23, 2003) (Master's Report). In this context, the Union seeks its legal fees and costs.

The Law

This Court generally follows the American rule, under which each litigant is responsible for his own costs and fees. *See, e.g.*, In re Carver Bancorp, Inc., Del. Ch., No. 17743, Steele, V.C. (Aug. 28, 2000) (Letter Op.) at 2. The Court does, however, shift fees and costs in at least two instances: where required by rule or statute; and in extraordinary cases where a special equity requires that a party be relieved of his costs. *See generally* 10 Del. C. §5106. The Union concedes that the jurisdiction of the PERB is created by statute, and that no applicable statute provides for the shifting of fees. The Union argues that the PERB has the inherent equitable power to award such fees, *citing* In re State, Del. Supr., 708 A.2d 983,

[2]The Union contends that the State changed its argument yet again before the PERB on remand and argued that it was prohibited from providing the employees' names and addresses because the common law right of privacy had "evolved" since the State had entered the agreement. See Claimant-Appellants Application for Attorneys Fees, at iii.

989 n. 23 (1989). At any rate, this Court has such jurisdiction and can award fees and costs as a matter of special equity. The Union claims that a special equity is present here, because the State has proceeded in bad faith.

Where a party engages in egregious misconduct amounting to bad faith, equity may require that he pay his opponent's costs of litigation. *E.g.* Taylor v. American Specialty Retailing Group, Inc., Del. Ch., No. 19239, Lamb, V.C. (July 25, 2003)(Mem. Op.) at 13. The Union contends that the bad faith of the State requires that fees be shifted here, on two grounds: (1) the State's rationale for terminating the agreement was unfounded as a matter of law, and thus the entire action rests on the bad faith of the State; and (2) the litigation tactics engaged in by the State were pursued in bad faith as demonstrated by the shifting ground on which the State proceeded to defend its actions.

Analysis

A) *The underlying actions of the State.* The Union points out that the PERB found that the abrogation of the agreement to provide employee names and addresses was an instance of the State not negotiating in "good faith," and based on that finding of bad faith argues that fee shifting is appropriate here. The type of bad faith which justifies fee shifting, however, is not to be found in so facile a

manner, or else every successful unfair labor practice complaint would bring with it attorneys fees:

> This Court has suggested that in certain egregious circumstances, a party's fraudulent behavior that underlies and forms the basis of the action may justify an award of attorney's fees against that party. The Court has recognized, however, that an award of attorney's fees is "unusual relief," and that the American Rule would be eviscerated if every decision holding the defendant liable for fraud and the like also awarded attorney's fees. For that reason this quite narrow exception is applied only in the most egregious instances of fraud or overreaching.

Arbitrium Handels AG v. Johnston, Del. Ch., 705 A.2d 225, 231 (1997)(internal quotations and citations omitted). In order to find that the State's initial action was taken in bad faith requiring the shifting of fees, I must find far more than that the State breached a contract with the Union or decided to argue a position which ultimately is found to be unsuccessful. I must find that the motives of the State in abrogating the Agreement were to act in a way which was fraudulent or inequitable, in a callous disregard of its obligations and for an improper purpose. Even assuming, as I do for purposes of this analysis, that the Union would have prevailed on appeal, based upon the facts before me, I cannot make such a determination here. The State has consistently (through its meandering attempts to

articulate the issue) raised the privacy rights of its employees, in ways which were ultimately unsuccessful before the Board but which do not rise to bad faith.

B) *The conduct of the litigation.* This Court will also shift fees where a party exhibits bad faith in its conduct of the litigation. *E.g.*, Arbitrium, 705 A.2d at 232-33. To award fees, I must find by clear evidence that the State litigated in subjective bad faith. Id.; In re Carvel Bancorp (Letter Op.) at 2. Such clear evidence of improper use of the judicial process is lacking here.

The Union argues that analogous case law available to the State should have made it aware that its position was unlikely to prevail. The Union has failed to demonstrate on the part of the State, however, a subjective disregard of a clearly untenable legal position. The law was not sufficiently developed that the State's bad faith is self-proving. *C.f.* Judge v. City of Rehoboth Beach, Del. Ch., No. 1613, Chandler, V.C. (April 29, 1994)(Mem. Op.) (finding prior adverse judicial ruling on issue presented one factor among several justifying fee-shifting). The Union also points to the State's litigation tactics during the course of this matter. As the Union has pointed out, the State shifted its ground during the course of this litigation, presumably as it found its prior arguments untenable, in a way which invoked first the jurisdiction of the PERB, then this Court's appellate jurisdiction, then the PERB's jurisdiction on remand. The State could certainly have pursued

this matter in a more efficient way, and I accept the Union's argument that its litigation costs would have been less if the the State had been more consistent and sure-footed.[3]

However, what is lacking in the Union's presentation is any demonstration that the State's litigation tactics were in bad faith, purposefully dilatory, or otherwise rising to a level which equity must address by fee shifting. While, as I have noted, the State changed its ground during the ligation in a way that required a remand, the State always based its legal defense of its action on a need to vindicate the privacy rights of its employees. Nothing in the record demonstrates to me a subjective litigation strategy on the part of the State of delaying an inevitable defeat by modifying its argument. It was the Court, not the State, which raised the issue of remand. I find that the State was motivated by nothing more sisnster than a desire to prevail on the merits.[4] The Union, in other words, is in

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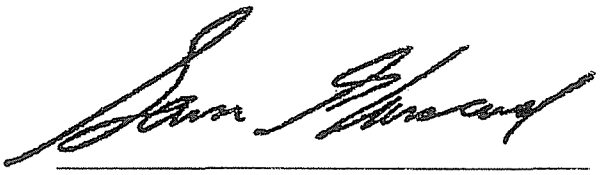
[3]Of course, the State itself has paid a penalty for its inefficiency in its own expenditures of time and costs.

[4]An undercurrent of the Union's argument is that the State must be punished for the fact that the Union has been de-certified during the pendency of this litigation. The Union suggests that, had the State provided names and addresses consistent with the Agreement, it would have increased the Union's ability to persuade its members to vote to continue to certify it, rather than its rival union. The State vigorously denies this. Based on the record here, I cannot find that the State's underlying decision to terminate the agreement led to the Union's de-certification; that such was the State's purpose; or that the State's litigation tactics furthered such a purpose.

the position of many a successful litigant who finds himself short of being made whole by the extent of his attorneys fees and costs.

CONCLUSION

For the foregoing reasons, the Union's request for attorneys fees must be denied.



Master in Chancery

oc: Register in Chancery (NCC)